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No. 82-1479

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioner,

V.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. THE CONDITIONS OF PERSONAL RECOGNIZANCE DO NOT CONSTITUTE A SEVERE RESTRAINT ON PERSONAL LIBERTY.

Respondent overstates the restrictions placed upon his liberty by virtue of a personal recognizance.

First, respondents' assertion that Mass. Gen. Laws c. 276 § 58, specifying

as a specific condition of recognizance the power of the court to revoke a defendant's recognizance and detain him up to 60 days upon finding probable cause to believe he has committed a crime during a period of release, "robs him of procedural safeguards that protect the general public" (Respondents Brief, 96), is inaccurate. That portion of §58 referred to by respondent was added by statute in 1982. 1982 Mass. Acts c.179. Respondent's recognizance issued in 1979 and contains no such condition.

Second, respondent misconstrues the phrase "not depart without leave," a condition of recognizance contained in ch. 278 §65. That ancient phrase means only that discharge from the recognizance must issue by order of the court and does not automatically follow from the absence of indictment or

complaint in the court to which the individual is summoned. State v. Stout, 6 Halst. 124, 11 N. J. L. 124 (1830). See also, Commonwealth v. Teevens, 143 Mass 210, 213 (1887) in which the court held that a recognizance was sufficient to bind a defendant to appear and answer an indictment for the same or a lesser offense described in a complaint.

Finally, no reasonable analogy can be drawn between pre-trial release upon personal recognizance without surety and the conditional release upon parole following conviction situation in Jones v. Cunningham, 371 U.S. 236 (1963).

Jones, having been convicted, sentenced and incarcerated, was released to the custody and control of the Parole Board. He was confined by the parole order to live in a particular community, in a particular house and to work at a

specific job. He could not drive a car without permission of the parole officer. He was required to periodically report to the parole officer and permit the officer to visit his home and place of work. His movements, social contacts and conduct were totally subject to review by the parole officer or Parole Board who alone were empowered to determine if any violation of the conditions of parole had occurred and return him to prison to serve out his sentence. The contrast to the conditions of personal recognizance is striking. The defendant here is required merely to appear at the jury session on the return day and at any subsequent time to which the case may be continued until final sentence, order or decree. He may not depart from his recognizance except by order or leave of

the court and he must "keep the peace and be of good behavior." Mass. Gen. Laws. c. 276 §65, c. 278 §17. Unlike the parole situation, any alleged violation of the conditions of recognizance is subject to judicial determination. (Compare, Jones v. Cunningham, 371 U.S. at 242, n. 19.). Clearly, no official control of one's everyday life is contemplated by the recognizance. Therefore, in the absence of "significant restraints" on the respondent's liberty, he is not "in custody" within the meaning of 28 U.S.C. §§ 2241, 2254."

II. THE TRIAL DE NOVO SYSTEM IS A VALID EXERCISE OF LEGISLATIVE POWER.

Respondent's suggestion that the Commonwealth may not structure its criminal court system in such a manner as to not encompass the rule of Burks v.

United States, 437 U.S. 1 (1978) (Respondent's Brief, 60-65), is without support. This court has often noted the ability of state legislatures and courts to fashion rules governing review. For example, in Tibbs v. Florida, 457 U.S. 31 (1982), the court in rejecting a theory that the Double Jeopardy clause barred retrial after appellate reversal on evidentiary weight, noted that to rule otherwise might well "prompt state legislatures simply to forbid those courts to reweigh the evidence." Tibbs, at 45-46 n. 22. Similarly, in Hankerson v. North Carolina, 432 U.S. 233, 245, n. 8 (1977), this Court acknowledged the ability of the state courts to enforce their own contemporaneous objection rule thereby obviating a defendant's ability to raise certain constitutional claims.

Moreover, policy considerations underlying the Double Jeopardy Clause do not require any disruption of the de novo system. While it is true that Burks forbids retrial after reversal for insufficient evidence. That rule should not apply where the defendant, at his sole election, has chosen a form of trial which does not permit appellate review of any alleged error of law or fact. It was entirely open to the defendant to have chosen a first instance jury trial with appellate review in the Appeals Court. Had he done so and successfully challenged his conviction of the ground of insufficient evidence, no retrial would be permitted. However, the defendant voluntarily chose to forego appellate review and proceeded initially to a bench trial with de novo trial to

follow. The situation falls squarely within the decision in Jeffers v. United States, 432 U.S. 137 (1977) where it was held, "...although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have two offenses tried separately ..." Id. at 152. Similarly, it was at defendant's election that he chose two totally independant trials rather than a single trial with appellate review. It cannot be maintained that the Commonwealth played any part in his election of this procedure. Therefore, it is urged that although in a somewhat different context the defendant here, by his election has created an exception to application of Burks, just as the defendant in Jeffers waived application of the rule of Brown

v. Ohio, 432 U.S. 161 (1977). "...the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99 (1978).

CONCLUSION

For the reasons stated in their brief and in this reply brief, petitioners respectfully request this Court to reverse the judgment of the Court below.

Respectfully submitted,

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